

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE  
FOURTH CIRCUIT

UNITES STATES OF AMERICA,	)	
Appellee	)	
	)	
v.	)	Appeal No. 19-4553
	)	
	)	
THOMAS GILLEN	)	
Appellant	)	

MOTION TO SUPPLEMENT THE RECORD

Comes now the Appellant, by and through Counsel, and moves this Honorable Court to supplement the record with materials that were not before the District Court. Specifically, Counsel seeks to include the following in the record:

- Transcript and/or video of U.S. Attorney Thomas Cullen's press conference of 02 October 2019
- Unclassified Electronic Communication of the Federal Bureau of Investigation, dated 19 March 2018
- Evidence at issue, including those items from ItsGoingDown, Discord, and ProPublica
- Thomas Cullen, *The Grave Threats of White Supremacy and Far-Right Extremism*, New York Times (Feb. 22, 2019)

- Harry Jaffe, *The Trump Appointee Who's Putting White Supremacists in Jail*, Washington Post (Aug. 7, 2019)
- Affidavit of FBI Special Agent Scott Bierwirth for the arrest of the Defendants in the related Los Angeles case against the Rise Above Movement
- Timothy J. Heaphy, Independent Review of the 2017 Protest Events in Charlottesville, Virginia (Nov. 24, 2017)
- News articles cataloguing Antifa violence
- Department of Justice, U.S. District Attorney's Office Western District of Virginia, *Florida Man Arrested for Making Racially-Motivated Threats in Interference with Election in Charlottesville and Cyberstalking* (Sept. 18, 2019)

Attorney Invictus spoke with AUSA Laura Rottenborn, who indicated that she opposes this Motion. In support of this Motion to Supplement the Record, the undersigned Counsel states as follows:

1. Defendant-Appellant Gillen entered a plea of guilty in the originating case, waiving his rights to appeal except for the constitutionality of the statute at issue, 18 U.S.C. § 2101, commonly known as the Anti-Riot Act.
2. Two methods exist to attack the constitutionality of a statute: Counsel can demonstrate that the statute is unconstitutional on its face, or he can

demonstrate that it is unconstitutional as applied. Counsel intends to do both but will rely heavily on the latter.

3. To demonstrate that the statute at issue is unconstitutional as applied to Defendant-Appellant, undersigned Counsel plans to demonstrate selective or discriminatory prosecution by the U.S. Attorney's Office.

4. The Second Circuit Appellate Court established a two-part test for selective or discriminatory prosecution in *United States v. Berrios*:

- (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and
- (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, **or the desire to prevent his exercise of constitutional rights**

501 F.2d 1207, 1211 (2d Cir. 1974) (emphasis added). The Supreme Court noted that “[t]hese two essential elements are sometimes referred to as ‘intentional and purposeful discrimination.’” *Id.* at 1211.

5. In the present matter, the Government is attempting to chill the exercise of first amendment rights by selectively prosecuting members of the right-wing, whom they call “white supremacists,” without arresting violent left-wing actors, whom they call “counter-protestors.”

6. While the record demonstrates constitutionally impermissible discriminatory prosecution to those knowledgeable about the political aspect of the

case, certain outside information is essential to Defendant-Appellant's argument, including statements made by the prosecutor to the media; evidence upon which the prosecution relied to make its decision to prosecute; and independent reports confirming the claims of Defendant-Appellant.

### **NOCARA ANTIFA**

7. In making its decision to prosecute, the U.S. Attorney's Office relied upon propaganda by known Communist organizations, including NoCARA, Unicorn Riot, and ProPublica.

8. In his Affidavit in Support of Arrest Warrant and Criminal Complaint (hereinafter "Cappuzzo Affidavit"), Special Agent Dino Cappuzzo of the Federal Bureau of Investigation favorably quoted NoCARA, an acronym for "Northern California Anti-Racist Action," which is an Antifa group. *See Aff. 5; Exhibit A, NoCARA About Page.*

9. This quotation did not concern acts of violence by the accused but rather a denigrating characterization of a group of men holding political views hostile to the radical left. *See Id.*

### **PROPUBLICA**

10. The evidence upon which the Cappuzzo Affidavit was based, as well as the narrative spun throughout it, was entirely the creation of ProPublica, which

organization U.S. Attorney Cullen thanked in his press conference for the “fantastic job” they had done for federal investigators.

11. The hit piece upon which the prosecution and the FBI relied was published 07 August 2018; the charges against Defendant-Appellant were filed twenty (20) days later, on 27 August 2018. *See Documenting Hate: Charlottesville*, FRONTLINE (Aug. 7, 2018) <https://www.pbs.org/wgbh/frontline/film/documenting-hate-charlottesville/> (last accessed Oct. 17, 2019); Complaint and Cappuzzo Affidavit. Either the U.S. Attorney’s Office was working in concert with the left-wing organization, demonstrating malicious intent to begin with, or they were unduly influenced in their decision to prosecute by an activist organization that lists “impact” as its stated aim.

12. ProPublica has published a white paper on “impact” as the measurement of success for activist journalism. *See* Richard J. Togel, ISSUES AROUND IMPACT: A WHITE PAPER FROM PROPUBLICA (Feb., 2013), [http://s3.amazonaws.com/propublica/assets/about/LFA\\_ProPublica-white-paper\\_2.1.pdf](http://s3.amazonaws.com/propublica/assets/about/LFA_ProPublica-white-paper_2.1.pdf). While ProPublica might be commended for its work in attacking Wall Street and police corruption, two things are certain: the first is that the publication is unabashedly left-wing; the second is that its work, whether left-wing or right-wing, should not be relied upon uncritically by federal agents and prosecutors, as it was in the case of the Rise Above Movement.

13. The “impact” sought by ProPublica in publication of its articles and “Documenting Hate” video was unequivocally the criminal prosecution of the members of the Rise Above Movement by federal authorities. The ProPublica video at issue quotes Michael German of the Brennan Center for Justice as saying, “Where was the FBI?” A.C. Thompson, the narrator and producer of the video, then proceeds to shame the FBI into action, going so far as to read excerpts of the FBI’s letter in response to his inquiry as to why the “white supremacists” in attendance at the Unite the Right Rally had not been prosecuted. He then immediately proceeds to make the case against the Rise Above Movement, which case would ultimately become the prosecution’s.

14. The “impact” sought also included the ruin of Defendant-Appellant Michael Miselis, who was terminated from his employment at the behest of ProPublica, as well as the expulsion of Vasiliios Pistolis, who was dishonorably discharged from the Marine Corps as a result of ProPublica’s efforts.

15. The photographs included in the Cappuzzo Affidavit were taken from the Twitter account of the Rise Above Movement but were originally noted in the ProPublica video. *Compare Id.* with Cappuzzo Aff. ¶¶ 10-17.

#### **PRESS CONFERENCE OF 02 OCTOBER 2019**

16. Perhaps the most essential and most telling of all these outside materials is the video of the press conference held by U.S. Attorney Thomas

Cullen the morning of the arrest of Defendant-Appellant. Transcript of 02 October 2019 Press Conference.

17. In that press conference, U.S. Attorney Cullen thanked ProPublica for the “fantastic job” they had done for federal investigators. *Id.* at 3.

18. He spun the narrative that “you had counter-protestors on one side and white supremacists on the other” at the Unite the Right Rally in Charlottesville on 12 August 2017. *Id.*

19. It should be noted that U.S. Attorney Cullen’s office has not arrested a single member of the Antifa, who were actually responsible for the riots in Charlottesville that day. *Vide infra ¶ 40-58; Cf. TIMOTHY J. HEAPHY, INDEPENDENT REVIEW OF THE 2017 PROTEST EVENTS IN CHARLOTTESVILLE, VIRGINIA* (Nov. 24, 2017).

20. Also in this press conference, U.S. Attorney Cullen spoke of an attack on a “minister wearing a clerical collar,” *Id.* at 1, without mentioning that these clerics were collaborating with Antifa in what they call “diversity of tactics,” a code word for violent action against right-wing activists. This evidences a clear instance of selective or discriminatory prosecution.

21. In this press conference, U.S. Attorney Cullen refers to the fire rally of 11 August 2019, stating that “more than a hundred white supremacists participated” and that the “park [was] filled with white supremacists.” Transcript at

3. Undersigned Counsel was one of the organizers of that rally and notes that this statement is both false and illustrative of the U.S. Attorney's Office's selective prosecution.

22. This is confirmed when, in speaking of the four men arrested, U.S. Attorney Cullen states that “[t]hese are members of an organized, militant, white supremacist group, and in our view, that made them righteous targets for federal prosecution[.]” *Id.* What is unspoken is that the organized, militant communists groups rioting in Charlottesville, *i.e.*, those similarly situated but of a more favorable ideology, were *not* “righteous targets for federal prosecution.”

23. Tom Chadwick, Assistant Special Agent in Charge for the FBI's Richmond Division, also referred the press to the work of ProPublica when asked about the investigation of the Defendants. *Id.* at 4.

24. In this press conference, when asked whether the decision to prosecute the present case was his or whether it was urged by other federal officials, U.S. Attorney Cullen stated that the order from above was “well-received,” indicating that this was a political decision by his own superiors in which he was complicit. *Id.* at 6. The selective and discriminatory prosecution at issue appears to be an office-wide policy of the Department of Justice, not just of the Western District of Virginia.

## EVIDENCE

25. The evidence presented to defense counsel at the trial level evidences selective prosecution and, therefore, constitutionally impermissible discriminatory prosecution. Specific items include an audio recording from the anarcho-communist website ItsGoingDown, a video leaked by Discord and Unicorn Riot, and the aforementioned video by ProPublica.

26. An unclassified electronic communication of the Federal Bureau of Investigation, dated 19 March 2018, accompanies the audio recording of a conversation between and amongst white nationalists.

27. This audio recording was posted at ItsGoingDown, an Antifa website that openly and notoriously advocates violent revolution and violence against anyone and everyone they believe to be Fascists or Fascist sympathizers.

28. The unclassified electronic communication warns: “PLEASE TAKE NOTE OF THE ANARCHIST WEBSITE AND USE A COLD COMPUTER FOR THE LINK OF THE AUDIO RELEASE[.]” Unclassified Electronic Communication of the Federal Bureau of Investigation (19 March 2018). At this stage of the investigation, in the Spring of 2018, the FBI noted both the political affiliation and the danger of its Antifa source. By the time of the arrests on 02 October 2018, the FBI and DOJ had come to use the term “counter-protesters.”

29. A separate video, published by Unicorn Riot and made from an audio file recorded on Discord, was also in the evidence compiled by the FBI and DOJ. Unicorn Riot is yet another overtly anarcho-communist organization, and Discord has famously leaked the communications of people they believe to be white nationalists.

30. Unicorn Riot publicly acknowledges its relationship with Discord: “Unicorn Riot obtained hundreds of thousands of messages from white supremacist and neo-nazi Discord chat servers after Charlottesville. Unicorn Riot Discord Leaks opens far-right activity centers to public scrutiny through data journalism.” *Discord Leaks, UNICORN RIOT,* <https://discordleaks.unicornriot.ninja/discord/> (last accessed Oct. 17, 2019).

31. The Government’s dependence on radical leftist organizations advocating violence against the right-wing, as well as its refusal to prosecute those radical leftists similarly situated to Defendant-Appellant, is clear indication of the constitutionally impermissible discriminatory prosecution at issue.

## **MEDIA**

32. U.S. Attorney Cullen has written an op-ed for the New York Times and worked with the Washington Post to publicize his political cases, both of which publications are historically and famously left-wing. Thomas Cullen, *The Grave Threats of White Supremacy and Far-Right Extremism*, NEW YORK TIMES

(Feb. 22, 2019); Harry Jaffe, *The Trump Appointee Who's Putting White Supremacists in Jail*, WASH. POST (Aug. 7, 2019).

33. Both pieces mention Charlottesville, and both evidence an axe to grind against the ideologies of “white supremacy” and “far-right extremism.”

34. Harry Jaffe, author of the Washington Post article, notes the political dimension of the present case as early as the subtitle: “As chief prosecutor for the Western District of Virginia, Cullen is **targeting violent white supremacists** using an antiriot statute passed in the 1960s to rein in leftist Vietnam war protestors.” Jaffe (emphasis added).

35. Notably absent in all statements made by U.S. Attorney Cullen to the media, whether in op-ed or interview form, is any condemnation of leftist violence or any stated desire to prosecute leftists similarly situated to Defendant-Appellant.

### **CALIFORNIA AFFIDAVIT**

36. Another outside document demonstrating constitutionally impermissible discriminatory prosecution is the Affidavit of FBI Special Agent Scott Bierwirth (hereinafter “Bierwirth Affidavit”) for the arrest of the Defendants in the related Los Angeles case against the Rise Above Movement.

37. Like the Affidavit of Dino Cappuzzo in Charlottesville, the Los Angeles Affidavit of Scott Bierwirth focuses primarily on the political ideology of the Rise Above Movement. *See* Bierwirth Affidavit, paragraphs 10, 14-16. The

phrase “white supremacy” occurs twelve (12) times in this document; the phrase “white supremacist” another four (4). *Cf.* Bierwirth Affidavit.

38. Like the Cappuzzo Affidavit, the Bierwirth Affidavit uses U.S. Attorney Cullen’s narrative, which is to say ProPublica’s narrative, of “white supremacists” attacking “counter-protesters.” *See* Bierwirth Affidavit ¶ 5, 20-28, 30, 37-41, 46, 48-49, 53-54, 56.

39. Like the Cappuzzo Affidavit, the Bierwirth Affidavit relies upon information gathered from radical leftists with a vested interest in maligning and destroying right-wing activists. *See* Bierwirth Affidavit ¶ 50-51. Special Agent Bierwirth, however, at least had the good sense not to name ProPublica and Unicorn Riot as his sources.

### **THE HEAPHY REPORT**

40. The Unite the Right Rally, the event underlying the present case, was an event organized by Jason Kessler, who told all attendees to avoid violence “at all costs” and not to bring weapons. TIMOTHY J. HEAPHY, INDEPENDENT REVIEW OF THE 2017 PROTEST EVENTS IN CHARLOTTESVILLE, VIRGINIA 79 (November 24, 2017).

41. The Antifa, a nationwide group of violent anarcho-communists, appeared in Charlottesville with a high level of organization and coordination. *Id.* at 51.

42. Arriving with body armor, pads, gasmasks, shields, and walkie-talkies, Antifa coordinated with local activists and had logistics and medical support. *Id.*

43. The Virginia Fusion Center had intelligence that Antifa was planning to appear with soda cans filled with cement and to use fentanyl to attack the police. *Id.* at 98.

44. The City of Charlottesville was unable to protect free expression, indicating a failing to uphold one of government's core functions: protecting fundamental rights. Law enforcement failed to protect citizens from harm, injury, and death. *Id.* at 7.

45. The City of Charlottesville retained Timothy Heaphy, former U.S. Attorney for the Western District of Virginia, *i.e.*, U.S. Attorney Cullen's predecessor, to conduct an independent review to discover the cause of the violence at Charlottesville. *Id.* at 9.

46. The resulting report vindicated the right-wing's assertions, to wit: that the left-wing planned violence at the event; that all right-wing attendees were targets of that violence; and that the State and local governments were complicit in the realization of that violence.

47. This independent report is valuable to the record on appeal because it demonstrates the fact that violent leftists were known by all concerned to be

planning attacks, that they did in fact execute those attacks, and that these facts were public information almost a full year before the U.S. Attorney's office prosecuted members of the Rise Above Movement.

### **CATALOGUE OF ANTIFA VIOLENCE**

48. Neither was the Unite the Right Rally in Charlottesville the first instance of Antifa violence in the country. Multiple news sources have documented myriad, unprovoked, violent attacks by Antifa, none of which have been prosecuted by the Department of Justice.

49. Through November 5, 2018, Breitbart catalogued 639 incidents of politically motivated violence or threats directed at Trump supporters and others on the political Right; which would include the Rise Above Movement. John Nolte, *Rap Sheet: \*\*\*639\*\*\* Acts of Media-Approved Violence and Harassment Against Trump Supporters*, BREITBART (July 5, 2018, updated Nov. 5, 2018) <https://www.breitbart.com/the-media/2018/07/05/rap-sheet-acts-of-media-approved-violence-and-harassment-against-trump-supporters/> (last accessed Oct. 17, 2019). Antifa was named as responsible in 26 of the incidents, including two riots at in Berkeley, California on April 15, 2017 and August 27, 2017.

50. On April 15, 2017 a member of Antifa assaulted a Trump supporter with a bike lock as part of an Antifa attempt to shut down a Berkley, California “Free Speech” rally. See George Kelly, *Bay Area college professor used U-shaped*

*bike lock in beating, police say,* EAST BAY TIMES (May 24, 2017) <https://www.eastbaytimes.com/2017/05/24/berkeley-college-professor-arrested-as-assault-suspect/> (last accessed Oct. 17, 2019). On August 27, 2017 attendees at a Berkley “No to Marxism in America” rally were assaulted by masked Antifa members with pepper spray and homemade shields. *See* Kyle Swenson, *Black-clad antifa members attack peaceful right-wing demonstrators in Berkeley*, WASH. POST (Aug. 28, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/08/28/black-clad-antifa-attack-right-wing-demonstrators-in-berkeley/> (last accessed Oct. 17, 2019).

51. Both incidents, and others among the 26 incidents of violence described by Breitbart, involve the use of deadly weapons that have moved in interstate commerce by an Antifa gang intent upon depriving demonstrators of their First Amendment rights. These incidents fit into a pattern of federal authorities callously ignoring an anarchist gang depriving the political Right of its civil rights.

52. Addition of these news stories in the record on appeal will go to show that the statute at issue is unconstitutional as applied, as it will demonstrate the fact that the Department of Justice has chosen to prosecute the right-wing while immunizing the left-wing.

**WILLING COLLUSION WITH FAR-LEFT RADICALS**

53. As for why none of this was addressed at the District Court level, undersigned Counsel sincerely doubts that any of the defense attorneys had any idea what they were looking at. One would have to be on the far-right or the far-left to understand how nefarious the Government's willing collusion with far-left radicals truly is.

54. The foremost expert undersigned Counsel would have gone to for assistance with researching this subject is a man known as Jack Corbin, who has assisted Counsel with such research in the past. As fate would have it, U.S. Attorney Cullen, who initiated the Fields case and the case of the Rise Above Movement, including that of Defendant-Appellant, has recently initiated another political attack on the right-wing with the arrest and indictment of Jack Corbin himself. *See Department of Justice, U.S. District Attorney's Office Western District of Virginia, Florida Man Arrested for Making Racially-Motivated Threats in Interference with Election in Charlottesville and Cyberstalking*, JUSTICE.GOV (Sept. 18, 2019), <https://www.justice.gov/usao-wdva/pr/florida-man-arrested-making-racially-motivated-threats-interference-election> (last accessed Oct. 17, 2019).

55. This demonstrates the prosecution's willingness to jail even those assisting in the legal or propaganda aspects of right-wing activism. Not since the

days of Martin Luther King, Jr. has a government agency been so out of control and so blatant in its discriminatory policies.

56. In the case of *United States v. Olvis*, this Court noted the two-pronged test for establishing selective or discriminatory prosecution:

- (1) that "similarly situated individuals of a different race were not prosecuted," Armstrong, --- U.S. at ----, 116 S. Ct. at 1487, and
- (2) that the decision to prosecute was "invidious or in bad faith," *United States v. Greenwood*, 796 F.2d 49, 52 (4th Cir. 1986) (quoting *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974))

*United States v. Olvis*, 97 F.3d 739 (4th Cir. 1996).

57. The element concerning race can be satisfied by pointing to the fact that no Black Lives Matter agitators have been arrested in connection with Charlottesville. Moreover, the racial element is not necessary, as the prosecution selected these individuals on the basis of exercise of their constitutional rights and were “motivated by a discriminatory purpose” *Wayte v. United States*, 470 U.S. 598, 608 (1985).

58. Instances of Antifa *actually* violating the Anti-Riot Act are innumerable, such that it is impossible that the U.S. Attorney’s Office could have failed to notice them. Moreover, Jack Corbin has been the foremost documenter and archivist of evidence to this effect – and he has just been jailed. This combination of facts goes to satisfying the second prong, demonstrating that

decisions to prosecute right-wing activists in Charlottesville are clearly “invidious or in bad faith.”

## **CONCLUSION**

59. It is well-known by those involved in radical politics that NoCARA, ProPublica, and Unicorn Riot are far-left outfits with a vested interest in maligning and destroying those in the right-wing, especially those who might belong to groups like the Rise Above Movement.

60. It is also well-known in such circles that U.S. Attorney Cullen has made a crusade against the ideology of “white supremacy” and has utilized every law he possibly can to prosecute right-wing activists in an effort to stop them from exercising their constitutional rights, thereby chilling free speech.

61. It is also well-known that the Heaphy Report vindicated the right-wing in noting that the chaos in Charlottesville was not the fault of “white supremacists” or of the Rise Above Movement but of the Charlottesville government and police.

62. Counsel appreciates, however, that these facts might not be so well-known to the Court, and believes it is necessary to demonstrate the leftist ideology of the organizations upon which the prosecution relied to make its decision to prosecute, as well as the ideological crusade of the U.S. Attorney in Charlottesville.

63. The Court may acknowledge these political realities in one of two ways: by taking judicial notice of all the claims above, or by exercising its inherent power to supplement the Record, allowing Counsel to provide documentation to this effect.

WHEREFORE Defendant-Appellant respectfully requests that the Court supplement the record with the aforementioned materials.

Respectfully submitted,

THOMAS GILLEN

By Counsel

/s/ Augustus Invictus

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### **CERTIFICATE OF SERVICE**

I hereby certify that on 09 October 2019, I electronically filed the foregoing motion of Appellant with the Clerk of the Court using the CM/ECF System, which will send notice, and constitute service, of such filing to the following registered CM/ECF user: Laura Rottenborn, Assistant United States Attorney, Counsel for the Appellee.

/s/ Augustus Invictus

Augustus Invictus, Esq.